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Supreme Court, U.S.
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No. 07-___ 08-100

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IN THE

Supreme Court of the United States

SOUTH FORK BAND, WINNEMUCCA INDIAN COLONY, DANN BAND, TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS, BATTLE MOUNTAIN BAND, ELKO BAND AND TIMBISHA SHOSHONE TRIBE,
Petitioners,

v.

UNITED STATES OF AMERICA, WESTERN SHOSHONE NATIONAL COUNCIL, RAYMOND YOWELL, ALLEN MOSS, JOE KENNEDY, JOHN WELLS, CARRIE DANN, JOHNNY BOBB, BENNY RILEY, TIMBISHA SHOSHONE TRIBE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can constructive notice under the limitations provision of the Quiet Title Act, 28 U.S.C. § 2409a(g), be construed on a motion to dismiss to extinguish any remedy for land rights of an Indian tribe under a treaty with the United States that have not before been litigated or adjudicated?

2. Is the Ninth Circuit's decision on constructive notice under the limitations provision of the Quiet Title Act in conflict with the "adverse interest" rule established in other courts of appeals, as well as the Ninth Circuit's prior decisions, under which constructive notice requires the government's assertion of not just any interest in the subject land, but rather an interest that is adverse to the claim set forth in the quiet title action?

PARTIES TO THE PROCEEDING

The Petitioners in this case consist of Native American tribes, bands and groups, all of whom are part of the Western Shoshone nation, and include South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain Band, Elko Band and Timbisha Shoshone Tribe. The Respondent is the United States of America, which is adverse to Petitioner. Also, named as Respondents in accordance with Rule 12.6 of the Supreme Court Rules is another group of Western Shoshone tribes, bands and members, who were Appellants in the Court of Appeals in a consolidated case, no. 06-16214, and include Western Shoshone National Council, Raymond Yowell, Allen Moss, Joe Kennedy, John Wells, Carrie Dann, Johnny Bobb, Benny Riley and Timbisha Shoshone Tribe. This Petition concerns exclusively the Court of Appeals' decision addressing issues raised under the Quiet Title Act, 28 U.S.C. §2409a, in case no. 06-16252. The two groups of Western Shoshone parties made different claims and filed separate pleadings in the District Court and separate notices of appeal to the Ninth Circuit. The appeals were consolidated at case nos. 06-16214 (Western Shoshone National Council et al. Appellants) and 06-16252 (South Fork Band et al. Appellants).

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

The South Fork Band, et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals (App. 1a-2a) is an unpublished disposition. The opinion and order of the District Court for the District

of Nevada granting the United States' motion to dismiss (App. 3a-12a) is reported at 415 F. Supp. 2d 1201 (D. Nev. 2006). The opinion of the District Court denying motion for rehearing (App. 13a-16a) is unpublished.

JURISDICTION

The judgment of the Court of Appeals (App. 1a-2a) was entered on April 21, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE AND TREATY INVOLVED

The limitations provision of the Quiet Title Act, 28 U.S.C. § 2409a(g), which is at the center of this Petition, is as follows:

> Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States

The Treaty with the Western Shoshone, 1863, 18 Stat. § 689 (the "Treaty of Ruby Valley"), is set forth in the Appendix at 21a-24a.

STATEMENT OF THE CASE

This case involves the assertion of rights in land arising under an Indian treaty that have not before been litigated, adjudicated or most significantly, the subject of an adverse claim by the United States. Despite this, the Ninth Circuit Court of Appeals affirmed the decision of the U.S. District Court for the District of Nevada dismissing the claims in this case for lack of subject-matter jurisdiction pursuant

to Fed. R. Civ. P. 12(b)(1), on the basis of constructive notice under the 12-year statute of limitations of the Quiet Title Act, 28 U.S.C. § 2409a(g).

The subject of this action is the Western Shoshone people's claim of title to approximately 60 million acres of land in Nevada and California under the Treaty of Ruby Valley. Beginning in 1951, the Western Shoshone were involved in protracted litigation with the United States before the Indian Claims Commission ("ICC"). The only land issue litigated by the ICC, however, was the Western Shoshone's claim to *aboriginal* title to a specific 24 million acre tract of land. The Western Shoshone's *treaty* title to 60 million acres described in the Treaty of Ruby Valley,[1] as well as their aboriginal title to land described in the Treaty outside the litigated tract, were not at issue before the ICC nor were they subsequently challenged by the United States in other federal court litigation. The Ninth Circuit Court of Appeals and the District Court held that the litigation of aboriginal title rights gave notice of an adverse claim by the United States to treaty title. Through an overbroad construction of notice under the Quiet Title Act, the courts below have effectively denied the Western Shoshone a remedy for their treaty land rights. This Court has held that "Indian treaty rights are too

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[1] In a related case, the Federal Circuit in an unpublished decision dated May 22, 2008 affirmed the dismissal of other claims brought by the South Fork Band et al. against the United States in the Court of Federal Claims. *Western Shoshone National Council v. United States*, 2008 WL 2166051 (Fed.Cir. 2008). Among other rulings, the Federal Circuit rejected an interpretation of the Treaty of Ruby Valley as conveying treaty title. Petitioners intend to file a Petition for Writ of Certiorari in that case (the time for such filing has not yet run in that case).

fundamental to be cast aside." *United States v. Dion*, 476 U.S. 734, 739-740 (1986). Yet in this case the courts below have done just that through the constructive notice provision of the Quiet Title Act's statute of limitations.

1. Claims Alleged in this Action

The operative pleading filed by the South Fork Band et al. in the District Court sets forth claims for relief in two counts. Count I is to quiet title to land described in the Treaty of Ruby Valley on the basis that the Western Shoshone own these lands by "treaty" title, also known as recognized title. (App. 35a-37a). Count II is to quiet title to 36 million acres of land claimed by the Western Shoshone under aboriginal title, also know as "Indian" title, which were not addressed in the ICC. (App. 38a-39a).

The pleading alleges treaty title, as follows:

> Under the Treaty of Ruby Valley, the Western Shoshone Nation granted the United States certain privileges for use of and access to the land described in the Treaty and, in exchange, the United States recognized Western Shoshone ownership of the land which under U.S. law equates to statutory or fee title.

(App. 29a ¶ 21). It is further alleged that the issue of treaty title was never actually litigated in the ICC, and no judgment or order was ever issued pertaining to the issue of treaty title. (App. 31a-33a, ¶¶ 31-38). Rather, the ICC litigated the extinguishment of aboriginal title to approximately 24 million acres of land, as of the stipulated date of July 1, 1872. (App. 31a-33a, ¶¶ 31, 33, 34, 36, 37). The Treaty of Ruby Valley, which was proclaimed just a few years prior to that stipulated date, delineated 60 million acres of

land within the Western Shoshone's boundaries. (App. 27a-30a). The ICC did not consider or adjudicate treaty title to this land, nor aboriginal title outside the 24 million acre tract addressed in the ICC case. (App. 30a-33a).

Also pertinent to this Petition are the *Dann* cases, which were litigated in federal courts in the 1970's and 1980's. These were trespass actions brought by the United States against two Western Shoshone members, who defended against the government's action by asserting exclusively aboriginal rights in the land. The issue of treaty title was expressly not before the courts. *See United States v. Dann*, 706 F.2d 919, 921 n.1 (9th Cir. 1983), *rev'd and remanded*, 470 U.S. 39 (1985). The scope of the *Dann* cases was no broader than the ICC litigation—they concerned only aboriginal title rights of the Western Shoshone.

2. District Court Proceedings

The District Court issued an Order dated January 17, 2006, containing its opinion, which dismissed the claims filed under the Quiet Title Act for lack of subject matter jurisdiction. The court set forth the grounds for its decision as follows:

> The extensive litigation that preceded the current actions makes it impossible to conclude that South Fork Band neither knew nor should have known that the United States claimed an interest in the land covered by the Treaty of Ruby Valley, adverse to that of South Fork Band, more than 12 years ago. The initial 1951 litigation was more than sufficient to place a reasonable landowner on notice that the United States claimed an interest in the land. The sole purpose of that litigation was to determine who owned

> the disputed property; property which included nearly half of the land covered by the Treaty of Ruby Valley. The United States' assertion of a right to land settled by its citizens that includes half of the land demarcated by a prior treaty would provide clear notice to a reasonable landowner that the United States claimed significant property interests adverse to that owner.

(App. 10a). The court held that "this [aboriginal title] interest claimed by the United States was adverse to any claim of ownership by the Shoshone and effectively began the running of the statute of limitations." (App. 12a). The District Court further relied upon the *Dann* cases, finding that the United States argued in that litigation "that it had effectively terminated the rights of the Shoshone people to own the land or even graze cattle on it", without distinguishing between the treaty title rights asserted in this action and the aboriginal title rights to 24 million acres exclusively at issue in *Dann*. (App. 11a).

The South Fork Band et al. moved for a rehearing on the grounds that the District Court's decision failed to adequately address the distinction between aboriginal title and treaty title, which was the gravamen of their argument against the finding of constructive notice under the Quiet Title Act. The court denied the motion for rehearing, without engaging in further analysis of the pertinent issue, as follows:

> In ruling on the United States' motion, the Court was fully aware of South Fork Band's arguments, considered them, and found them without merit. In addition, South Fork Band's argument that application of the constructive notice doctrine of the Quiet Title Act is not appropriate when

> treaty rights are involved is more appropriately raised on appeal if one is taken. The court applied the law of the circuit to the facts of the case. The fact that South Fork Band does not think the law should apply does not demonstrate clear error.

(App. 15a-16a). In neither its opinion granting the motion to dismiss nor the opinion on motion for rehearing did the District Court expressly address the issue of whether a claim adverse to aboriginal title rights is necessarily and implicitly adverse to title rights under the Treaty of Ruby Valley alleged in the South Fork Band et al.'s claim.

3. The Court of Appeals Decision

The Ninth Circuit Court of Appeals resolved the South Fork Band et al.'s appeal in one sentence, as follows: "The District Court properly dismissed the quiet title claims which are barred by the 12-year statute of limitations in the Quiet Title Act." *See* 28 U.S.C. § 2409a(g). The Court of Appeals thus adopted the District Court's opinion on the pertinent issues.

4. Basis for Federal Jurisdiction

Federal jurisdiction was asserted in the court of first instance under 28 U.S.C. §§ 1331, 1362, 2201 and 2409a. This is an action by an Indian tribe or band seeking declarations of quiet title against the United States. This Petition concerns the Ninth Circuit Court of Appeals' affirmance of the District Court's dismissal of the South Fork Band et al's claims for lack of subject matter jurisdiction under 28 U.S.C. § 2409a.

REASONS FOR GRANTING THE PETITION

This Court has never ruled on the scope of constructive notice under the 12-year limitations provision of the Quiet Title Act, 28 U.S.C. § 2409a(g). Under this provision, an action is deemed to have accrued "on the date that the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." There are two reasons why this Petition should be granted.

First, the decision of the Ninth Circuit Court of Appeals departs from those of other courts of appeals which have held that constructive notice must be based on an interest claimed by the United States that is adverse to that asserted by the plaintiff in the quiet title action. *See, e.g., Werner v. United States*, 9 F.3d 1514, 1517-1519 (11th Cir. 1993) (reversing summary judgment in favor of United States which had improperly lumped together interests asserted by the government over time for purposes of the Quiet Title Act's statute of limitations). The constructive notice found to bar the Western Shoshone's claim in this case concerned a separate and distinct interest in property—aboriginal title to a 24 million acre tract—from the property rights arising under the Treaty of Ruby Valley that are claimed in this action.

Second, the Ninth Circuit's decision denies a remedy to significant treaty rights by an overbroad construction of the notice provision of the Quiet Title Act, 28 U.S.C. § 2409a(g). This Court in *United States v. Mottaz*, 476 U.S. 834 (1986), held that the Quiet Title Act's waiver of sovereign immunity for claims against the United States to title to real property, along with its statute of limitations, applied to Indian plaintiffs the same as other plaintiffs. *Mottaz*, 476 U.S. at 851. However, the expansive reach of

constructive notice under the holding in this case broadly affects treaty land rights, denying them a remedy and effectively extinguishing them on faint notice. The issue concerning the interplay between treaty rights and constructive notice under the Quiet Title Act raised in this case is one of great importance that should be decided by this Court.

I. THE COURT OF APPEALS' DECISION ON THIS IMPORTANT MATTER AFFECTING TREATY RIGHTS IS IN CONFLICT WITH OTHER COURTS OF APPEALS' DECISIONS

The ICC and federal court *Dann* litigation relied upon by the Court of Appeals and District Court for constructive notice concerned only the Western Shoshone's claim to aboriginal title to a certain tract of land. The present action seeks to quiet title to different interests in land, which were never litigated nor addressed outside the Quiet Title Act's limitations period, principally Western Shoshone treaty title under the Treaty of Ruby Valley. This decision is in conflict with the Eleventh Circuit's decision in *Werner v. United States*, 9 F.3d 1514 (11th Cir. 1993). In *Werner*, the owners of land that was bordered on three sides by water and on the fourth side by Eglin Air Force Base brought an action to quiet title to a roadway easement through the Air Force's land. The district court granted judgment for the government under the Quiet Title Act's 12-year statute of limitations on the basis that "plaintiffs and their predecessors in interest knew of should have known for more than 12 years before filing suit that the government claimed some interest in or ownership of the Eglin property." *Id.* at 1516. In reversing the district court, the Eleventh Circuit noted that the proper issue

under the Quiet Title Act was not whether the plaintiff knew that the government had an interest in the property, but rather "when did plaintiffs know, or should have known, that the government had changed its position, and, adversely to the interests of plaintiffs, denied or limited the use of the roadway for access to plaintiffs' property." *Id.* The court explained the district court's error as follows:

> The primary position of the government is that the notice that triggers the statute of limitations need be only that the government claims some interest—any interest—in the property. *We reject this theory. For statute of limitations purposes, the first inquiry must define the government's claim* and then one must look to the time that the government, acting adversely to the interest of others, seeks to expand that claim. The district court erred in deciding the limitations issue by summary judgment.

Id. at 1518-1519 (emphasis supplied).

The court in *Werner* relied upon cases from other courts of appeals, including the Ninth Circuit, where the issue was likewise framed as when the government first sought to expand its claim to land by asserting *an interest adverse to that raised in the quiet title action. Narramore v. United States*, 852 F.2d 485 (9th Cir. 1988); *Park County, Montana v. United States*, 626 F.2d 718 (9th Cir. 1980); *Kinscherff v. United States*, 586 F.2d 159 (10th Cir. 1978). The Court of Appeals here, in affirming and adopting the District Court's opinion, did not rely upon this "adverse interest" rule. Rather the court appears to have applied the overbroad theory of constructive notice rejected in *Werner*. There is therefore an apparent conflict in this decision with those of

other courts of appeals on this important matter, which in this case affects substantial treaty land rights.

Reference to the "contours" doctrine under *Knapp v. United States*, 636 F.2d 279 (10th Cir. 1980), does not avoid this conflict. In *Knapp*, the court held that the plaintiff's claim was barred under the 12-year limitation period of the Quiet Title Act, rejecting the plaintiff's argument that, despite the existence of recorded deeds, the limitations period did not accrue until the government performed a survey of the disputed land "and thereby set forth a definitive title claim." *Id.* at 283. In so holding, the court noted that "[k]nowledge of the claim's full contours is not required. All that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's." *Id.* *See also Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 737-38 (8th Cir. 2001) (citing the "contours" doctrine, and holding that a quit claim deed to the land that was widely reported by local media outlets constituted notice).

The Ninth Circuit Court of Appeals has in the past distinguished *Knapp* where it was not shown that, outside the 12-year limitations period, the government claimed an interest adverse to the particular interest claimed by the plaintiff in the quiet title action. In *Fadem v. U.S.*, 52 F.3d 202 (9th Cir. 1994), the court held "that application of the 'contours' doctrine established by *Knapp* is improper in this case." *Id.* at 207. Specifically, the court in that case held that notice of the government's claim to the "eastern" section of disputed property did not imply notice of its claim to the "western" section of that property. *Id.* The plaintiff in *Fadem* had no reason to believe that his dispute with the United States

extended to the other portion of the property. The contours of the government's respective claims to the eastern and western sections were separable. *Id.* Likewise, in this case, aboriginal title and treaty title are separate and distinct interests, and the government's claim relating to aboriginal title would have no bearing on that pertaining to treaty title.

Although an aboriginal interest in land is denominated as "title", only "treaty" title connotes a traditional and common understanding of ownership. *See Miami Tribe of Oklahoma v. U.S.*, 146 Ct. Cl. 421, 175 F. Supp. 926 (Ct. Cl. 1959). Aboriginal title, in contrast, is *not* a property right, but instead a possessory interest:

> [Indian title or aboriginal title] means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

Tee-Hit-Ton Indians v. U.S., 348 U.S. 272, 279 (1955).

The means of proving aboriginal title is very different from that for treaty title. *See U.S. v. Pueblo of San Ildefonso*, 206 Ct. Cl. 649, 513 F.2d 1383 (Ct. Cl. 1975) ("[i]n order for an Indian claimant to prove aboriginal title, there must be a showing of actual, exclusive and continuous use and occupancy for a

long time . . .") (internal quotations and citations omitted) Unlike aboriginal title, treaty title presents a matter of treaty interpretation or construction, which is ascertained by the written words of the treaty, its history and negotiations, and the practical construction of the treaty adopted by the parties. *U.S. v. State of Washington*, 135 F.3d 618, 630 (9th Cir. 1998). This Court has held that a tribe which has recognized title to land has rights in the land akin to fee simple title, such that the tribe is entitled to due process and just compensation before the government may execute a power and take an interest in the land. *United States v. Sioux Nation of Indians*, 448, U.S. 371, 421-422 (1980). The Western Shoshone people's claim to recognized title was never at issue in the ICC proceedings or the *Dann* cases, and the rulings and orders of the ICC accordingly addressed only claims relating to aboriginal title. (App. 30a-33a, ¶¶ 26-38).

The Ninth Circuit Court of Appeals in *Michel v. United States*, 65 F.3d 130 (9th Cir. 1995), quoted the "adverse interest" rule set forth in *Werner* in distinguishing a claim of ownership from a claim of non-possessory easement. The court held that notice of the government's claim to title to land was insufficient to trigger constructive notice of an interest adverse to the plaintiff's claimed easement rights: "[K]nowledge of a government claim of ownership may be entirely consistent with a plaintiff's claim." *Id.* at 132. The court noted that the "adverse interest" rule was well grounded in policy:

> A contrary holding would lead to premature, and often unnecessary, suits. If a government claim to title were sufficient to trigger the running of the limitations period on any claim affecting use

> of the property, a claimant of a right of access would be forced to bring suit within twelve years even though the government gave no indication that it contested the claimant's right. The claimant would be compelled to sue to protect against the possibility, however remote, that the government might someday restrict the claimant's access. The statute should not be read to create such an undesirable result.

Id.

In this case, the government's claim to specific land held by aboriginal title is entirely consistent with the Western Shoshone's claim of treaty title. The Treaty of Ruby Valley grants the government extensive privileges, rights of use and access to the land, which were provided by the Western Shoshone in exchange for recognized ownership to the land described in the Treaty. (App. 21a-24a). The Treaty allows the "white men" routes of travel (Article 2), utility lines (Article 3), and prospecting, mines, ranches and agricultural settlements in the territory (Article 4). (App. 21a-22a). Accordingly, the encroachment found by the ICC which extinguished aboriginal title to a 24 million acre tract of land is consistent with the Western Shoshone's rights set forth in the Treaty of Ruby Valley, and would have had no effect upon the title specifically and expressly reserved to the Western Shoshone in the Treaty. (App. 27-32a).

The issue of constructive notice in this case gives rise to a factual dispute on the accrual of the Western Shoshone's claim to title under the Treaty. The Court of Appeals affirmed the dismissal of this case at the pleadings stage despite this issue of fact. Although the Quiet Title Act's statute of limitations is jurisdictional, a dismissal at the pleading stage on

the factual issue of the accrual of the statute of limitations is premature absent clear and unambiguous notice, and is otherwise properly addressed at the summary judgment stage. *See Michel v. U.S.*, 65 F.3d 130, 132 (9th Cir. 1995) (reversing dismissal of complaint based on the Quiet Title Act statute of limitations); *Patterson v. Buffalo National River,* 76 F.3d 221, 224 (8th Cir. 1996) (reversing summary judgment based on Quiet Title Act statute of limitations); *Amoco Production Co. v. U.S.*, 619 F.2d 1383 (10th Cir. 1980) (affirming grant of summary judgment); *Chesney v. U.S.*, 632 F. Supp. 867 (D. Ariz. 1985) (granting summary judgment motion); *Devils' Lake Sioux Tribe v. State of North Dakota*, 917 F.2d 1049 (8th Cir. 1990) (reversing summary judgment based on Quiet Title Act statute of limitations). Further, in a prior Ninth Circuit decision, the court stated that "[t]he statute of limitations is not triggered when the United states' claim is ambiguous or vague." *Schultz v. Department of Army*, 886 F.2d 1157 (9th Cir. 1989). The facts relied upon by the Court of Appeals and District Court to find notice in this case, pertaining to prior litigation of aboriginal title rights to specific land, are, by their nature, ambiguous and vague when viewed in conjunction with a claim to treaty title.

The Court of Appeals, in affirming the District Court's decision to grant the government's motion to dismiss under Fed. R. Civ. P. 12(b)(1), has denied the South Fork Band et al. access to the courts to have their claims to title under the Treaty of Ruby Valley decided on the merits. This decision is in conflict with the "adverse interest" rule set forth in *Werner*, as well as prior cases of the Ninth Circuit Court of Appeals that have applied this rule. This is an important matter that concerns rights under an

Indian treaty that have never been litigated or adjudicated. At this point, only this Court can vindicate those rights.

II. THE ISSUE OF CONSTRUCTIVE NOTICE IN THIS CASE IS ONE OF GREAT IMPORTANCE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

This case raises an important question regarding the reach of constructive notice under the Quiet Title Act to rights asserted under an Indian treaty. "A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *State of Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). Treaties are accorded special rules of contract interpretation: "[T]reaties are to be interpreted liberally in favor of the Indians, . . . and treaty ambiguities to be resolved in their favor." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 (1999). At the same time, [t]reaties between the United States and Indian tribes are congressional acts akin to statutes." *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 457 (7th Cir. 1998). "Only Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." *Mille Lac's Band*, 526 U.S. at 202. Such intent "is not be lightly imputed. . . . Indian treaty rights are too fundamental to be cast aside." *United States v. Dion*, 476 U.S. 734, 739 (1986).

The South Fork Band et al. in this case seek to vindicate their treaty rights through the Quiet Title Act. For purposes of this Petition, it is accepted that Indian tribes and bands can only vindicate treaty

rights against the United States through this Act. *Block v. North Dakota*, 461 U.S. 273 (1983). The statute of limitations provision in the Quiet Title Act is a condition to the waiver of sovereign immunity, which defines the Court's jurisdiction. *Block*, 461 U.S. at 287; *United States v. Mottaz*, 476 U.S. 834, 841 (1986). Nonetheless, given the significance and sanctity of treaty rights, care should be exercised in determining that the constructive notice provision of the 12-year statue of limitations under the Quiet Title Act bars a remedy against the United States concerning land rights under a valid treaty. Indian tribes and bands are particularly vulnerable to an overbroad, expansive view of the constructive notice provision of the Quiet Title Act. Indian parties have generally been immersed in litigation with the United States for many years concerning various land issues. The ICC was the venue for many of these disputes. If interests in land are lumped together, and the "adverse interest" rule relaxed or ignored to the point that litigation of a particular tribal interest in land results in a statute of limitations bar on other distinct real property claims under a treaty, then important treaty rights will be subtly, yet broadly, washed away on the thin thread of constructive notice.

The scope of constructive notice under the Quiet Title Act need not be construed in this instance so broadly as to impair the Western Shoshone people's remedy to assert substantial treaty rights. The prior litigation of aboriginal title to a particular tract of land in the ICC and the *Dann* litigation did not concern or affect the Western Shoshone people's claim to treaty title, and their claim to treaty title is entirely consistent with the extinguishment of Western Shoshone aboriginal lands.

The Court of Appeals, nonetheless, relied upon the District Court's analysis in dismissing the quiet title claims, although the District Court's opinion notes that the issue of conflict between an expansive view of constructive notice and the sanctity of treaty rights is "more appropriately raised on appeal. . . ." (App. 16a). If anything, given the importance of treaties and the rights they provide to their beneficiaries, constructive notice should be construed circumspectly when land rights under a treaty are at issue. Here, the Court of Appeals did the opposite, waiving a broad brush that blurs distinct land rights and interests. The Court of Appeals' decision thus creates a significant threat to treaty rights, which will likely prompt tribes to engage in more litigation to avoid the potential loss of these rights.

It is thus now within the domain of this Court to decide the appropriate balance between, on one side, constructive notice under the 12-year limitations period and jurisdictional prerequisite of the Quiet Title Act, and on the other side, valid and substantial treaty rights. In reaching this balance, the Western Shoshone people are entitled to be accorded a remedy that is no more restrictive in application than that available to non-treaty based quiet title claims. The Court of Appeals' decision does not achieve this balance. Accordingly, the issue of federal law raised in this case one of great importance that has not been, but should be, considered and settled by this Court.

CONCLUSION

Petitioners, the South Fork Band et al. respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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July 21, 2008

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed APR 21 2008]

No. 06-16214
D.C. No. CV-04-00702-LRH

WESTERN SHOSHONE NATIONAL COUNCIL; RAYMOND YOWELL; ALLEN MOSS; JOE KENNEDY; JOHN WELLS; CARRIE DANN; JOHNNY BOBB; BENNY RILEY; THE TIMIBISHA SHOSHONE TRIBE; DANN BAND; ELKO BAND; SOUTH FORK BAND; WINNEMUCCA INDIAN COLONY,
Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA,
Defendant - Appellee.

No. 06-16252
D.C. No. CV-04-00702-LRH

WESTERN SHOSHONE NATIONAL COUNCIL; RAYMOND YOWELL; ALLEN MOSS; JOE KENNEDY; JOHN WELLS; CARRIE DANN; JOHNNY BOBB; BENNY RILEY; THE TIMIBISHA SHOSHONE TRIBE; BATTLE MOUNTAIN BAND,
Plaintiffs,

DANN BAND; ELKO BAND; SOUTH FORK BAND; WINNEMUCCA INDIAN COLONY; ELKO BAND; SOUTH FORK BAND; TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS; WINNEMUCCA INDIAN COLONY,
Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA,
Defendant - Appellee.

Appeal from the United States District Court for the District of Nevada Larry R. Hicks, District *Judge*, Presiding

Argued and Submitted April 15, 2008
San Francisco, California

MEMORANDUM

Before: KOZINSKI, Chief Judge, GOULD and N.R. SMITH, *Circuit Judges.*

The district court properly dismissed the quiet title claims which are barred by the twelve-year statute of limitations in the Quiet Title Act. *See* 28 U.S.C. § 2409a(g). The remaining claims were properly struck as redundant or immaterial. *See* Fed. R. Civ. P. 12(f).

AFFIRMED.

This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed 01/17/2006]

03:04-CV-0702-LRH (VPC)

WESTERN SHOSHONE NATIONAL, *et al.*,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER

Presently before this court is the defendant United States of America's (hereafter the "United States") motion to dismiss the second amended complaints filed in this matter (#50[1]). Plaintiffs Western Shoshone National Council, Raymond Yowell, Allen Moss, Joe Kennedy, John Wells, Carrie Dann, Johnny Bobb, Benny Riley and the Timibisha Shoshone Tribe (collectively "Western Shoshone National Council") have opposed (#52) the motion to dismiss, or in the alternative strike, their second amended complaint (#46). Plaintiffs South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain and Elko Band (collectively "South Fork Band") have opposed (#54) the motion to dismiss their second amended complaint (#45). The United States has filed a reply covering both Western Shoshone National Council and South Fork Band's motions (#57).

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[1] References to (#XX) refer to the court's docket.

FACTUAL AND PROCEDURAL BACKGROUND

The present dispute arises out of a long standing legal battle over the rights of the Shoshone people to lands they claim to have owned which cover most of eastern Nevada as well as portions of California, Idaho and Utah. In the present incarnation of this battle, more than 60 million acres are in dispute. The boundaries of this land are defined by the Treaty of Ruby Valley; negotiated and agreed to by the United States and the northwestern bands of the Shoshone Indians in 1863 and ratified by Congress in 1864.

However, through gradual encroachment by American settlers, much of what used to be Shoshone land was coopted for use by the United States. In 1951, the claim which became the progenitor of the current lawsuit was filed with the Indian Claims Commission[2] ("ICC"). That lawsuit claimed title to a large portion of land which included 24 million acres that fell within the boundaries of the Treaty of Ruby Valley. In that litigation, the representatives of the Shoshone Indians, the Te-Moak Band (a plaintiff in the present lawsuit), alleged ownership of the disputed property based on aboriginal title (a claim of possession of the land since time immemorial) and on ownership of the fee title based on the Treaty of Ruby Valley. The proceedings progressed under the aboriginal title theory. In 1974, the court ruled that the Shoshone title to the land had been extinguished

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[2] The ICC was created by Congress to resolve the mounting number of Native American claims to land formerly occupied by their tribes with finality and to relieve Congress of having to determine the merits of such claims. *See United States v. Dann*, 470 U.S. 39, 45 (1985).

by encroachment of American settlers and awarded approximately 26 million dollars in compensation.

Also in 1974, the United States instituted a trespass proceeding against Mary and Carrie Dann[3] alleging they were violating federal law by grazing cattle on federal lands without authorization. The case wound its way up and down the legal system, with the Supreme Court weighing in on the issue of when their aboriginal title was effectively terminated by the government, before finally coming to a conclusion. When the dust settled, the one clear ruling that persevered was that any aboriginal title claim on behalf of the Shoshone Indians concerning the land involved in the 1951 litigation had been extinguished.

Many other suits have been filed based on the 1951 litigation. One case of note determined that the Shoshone people had their title totally extinguished and therefore no longer held hunting and fishing rights based on the *Treaty of Ruby Valley*. *W Shoshone Nat'l Council v. Molini,* 951 F.2d 200, 203 (9th Cir. 2001). However, no case has addressed the exact issues brought before this court.

The present lawsuit was filed September 29, 2003, in the Federal District Court of the District of Columbia. That court severed the claims brought in the original lawsuit, transferring some to the Court of Federal Claims while sending the quiet title claims to this court. The purpose of the reverence was to allow a court in the district where the disputed land exists to determine the disposition of that land. The Western Shoshone National Council and the South Fork

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[3] Carrie Dann and the Dann Band are plaintiffs to the present lawsuit.

Band have since filed second amended complaints. (#46 and #45).

The United States has moved to dismiss the action. Concerning the South Fork Band complaint (#45), the United States moves to dismiss on five grounds: first, that the statute of limitations on a quiet title action has run; second, that the ICC provided the exclusive remedy for plaintiffs and that any subsequent actions are barred; third, that the plaintiffs lack standing to bring this suit; fourth, that res judicata and collateral estoppel bar the present suits; and fifth, that the Treaty of Ruby Valley created no substantive rights in the Shoshone Indians. Regarding the Western Shoshone National Council complaint (#46) the United States has moved to dismiss based on sovereign immunity or, in the alternative, to strike the complaint under Federal Rule of Civil Procedure 12(f).

LEGAL STANDARD FOR MOTION TO DISMISS

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court asks only whether the pleadings are sufficient to establish a claim, not whether the Plaintiff could find evidence to support the pleadings. *See e.g., Lee v. City of Los Angeles,* 250 F.3d 668, 688 (9th Cir. 2001) (noting that "factual challenges to a plaintiff's complaint have no bearing on the legal sufficiency of the allegations"). Therefore, for the purpose of the motion, the court accepts as true all material allegations in the complaint and construes those allegations in the light most favorable to the non-moving party. *NL Indus., Inc. v. Kaplan,* 792 F.2d 896, 898 (9th Cir. 1986) *(citing North Star Int'l v. Arizona Corp. Comm'n,* 720 F.2d 578, 580 (9th Cir. 1983)). Dismissal is warranted only if it appears to a certainty that the

Plaintiff would not be entitled to relief under any set of facts that could be proven. *Id.*

However, when subject matter jurisdiction is attacked via Rule 12(b)(1), the court is granted more leeway. This is so because federal courts are courts of limited jurisdiction, *Owen Equip. & Erection Co. v. Kroger*, 473 U.S. 365, 374 (1978), and are "presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

"In ruling on a challenge to subject matter jurisdiction, the district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary." *Augustine v. U.S.*, 704 F.2d 1074, 1077 (9th Cir. 1983) *(citing Thornhill Publ'g Co. v. General Tel. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). When the court is faced with a factual attack on subject matter jurisdiction, ""[n]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.'" *Thornhill Publ'g Co., Inc.*, 594 F.2d at 733 *(quoting Mortensen v. First Fed. Say. & Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977)). "However, where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Augustine*, 704 F.2d at 1077. "[A]n action should not be dismissed for lack of jurisdiction without giving the plaintiff an opportunity to be heard unless it is clear

the deficiency cannot be overcome by amendment." *May Dept. Store v. Graphic Process Co.*, 637 F.2d 1211, 1216 (9th Cir. 1980).

If the United States is a party to an action and it has not waived its sovereign immunity, the action must be dismissed for lack of subject matter jurisdiction. *U.S. v. Nye County, Nev.*, 178 F.3d 1080, 1089 n.12 (9th Cir. 1999); *Elias v. Connett,* 908 F.2d 521, 527 (9th Cir. 1990); *Pesci v. I.R.S.,* 67 F.Supp.2d 1189, 1194 (D. Nev. 1999). The plaintiff bears the burden of proving that sovereign immunity has been unequivocally waived. *Cato v. U.S.*, 70 F.3d 1103, 1107 (9th Cir. 1995).

DISCUSSION

1. *Western Shoshone National Council Complaint*

The United States has moved to dismiss the claims raised by Western Shoshone National Council as outside the scope of the matters transferred to this court. In the alternative, the United States requests the court strike the Western Shoshone National Council complaint under Federal Rule of Civil Procedure 12(f) as redundant and immaterial. The claims contained in the Western Shoshone National Council complaint are: (1) a request to relieve the Western Shoshone National Council of the judgment rendered in *United States v. Dann*, 470 U.S. 39 (1985); (2) a request for a declaration that the Treaty of Ruby Valley is in full force and effect; (3) a request for a declaration of the rights of the parties; and (4) a request for a declaration that the Western Shoshone Claims Distribution Act is unconstitutional.

The court has reviewed the claims contained in the Western Shoshone National Council complaint and concludes that most are a necessary part of the South

Fork Band complaint. The court would not be able to quiet title in the South Fork Band, should the court reach that issue, unless the plaintiffs are relieved from the ruling that their claim to title has been extinguished as described in *Dann*, have the Treaty of Ruby Valley deemed to be in full force and effect (as well as construed to provide substantive rights to the land in the Shoshone), and eventually declare the rights of the parties in relation to the disputed property. Thus, these three claims are redundant to the transferred causes of action and will be struck pursuant to Rule 12(f).

The remaining claim seeks a declaration that the Western Shoshone Claims Distribution Act, passed in 2004, is unconstitutional. This claim has nothing to do with the underlying quiet title actions and is therefore immaterial to the claims transferred to this court. Thus, the claim will be struck pursuant to Rule 12(f).

2. *South Fork Band Complaint*

Despite the long and complicated history in this matter, the proper disposition of the quiet title actions is fairly straight forward. As discussed below, the court is without subject matter jurisdiction to hear the present dispute as the Quiet Title Act's ("QTA") statute of limitations creates a jurisdictional bar in this instance.

The relevant portion of the QTA provides that any "civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. § 2409a(g). An action is deemed to accrue "on the date plaintiff or his predecessor in interest knew or should have known of the claim of the United States." *Id.* When determining these

issues, the court "must strictly construe the Quiet Title Act's statute of limitations in favor of the government." *Shultz v. Dep't of Army*, 886 F.2d 1157, 1159 (9th Cir. 1989).

"The statutory term 'should have known' imparts a test of reasonableness." *Id.* at 1160 (citing *California v. Yuba Goldfields, Inc.*, 752 F.2d 393, 396 (9th Cir. 1985); *Amoco Prod. Co. v. U.S.*, 619 F.2d 1383, 1388 (10th Cir. 1980)). The court is thus called to determine "whether the United States' actions would have alerted a reasonable landowner that the government claimed an interest in the land." *Id.* "Knowledge of the claim's full contours is not required. All that is necessary is a reasonable awareness that the United States claims 'some' interest adverse to the plaintiff." *Hawaii v. United States,* 676 F.Supp. 1024, 1033 (D. Haw. 1988), *aff'd,* 866 F.2d 313 (9th Cir. 1989).

The extensive litigation that preceded the current action makes it impossible to conclude that South Fork Band neither knew nor should have known that the United States claimed an interest in the land covered by the Treaty of Ruby Valley, adverse to that of South Fork Band, more than 12 years ago. The initial 1951 litigation was more than sufficient to place a reasonable landowner on notice that the United States claimed an interest in the land. The sole purpose of that litigation was to determine who owned the disputed property; property which included nearly half of the land covered by the Treaty of Ruby Valley. The United States' assertion of a right to land settled by its citizens that includes half the land demarcated by a prior treaty would provide clear notice to a reasonable landowner that the United States claimed significant property interests adverse to that owner.

In addition, the *Dann* case initiated in 1974 provided even greater warning that the United States intended to assert a right to land covered by the Treaty of Ruby Valley. In that case the United States argued that it had effectively terminated the rights of the Shoshone people to own the land or even graze cattle on it. The government's position was clearly contrary to any asserted title rights the Shoshone may have had and would have placed a reasonable landowner on notice of the adverse claims.

South Fork Band argues that the prior litigation involving aboriginal title was sufficiently separate and distinct from any battle over treaty title that the statute of limitations should not have begun running at that time. Specifically, South Fork Band relies on the case of *Fadem v. United States*, 52 F.3d 202 (9th Cir. 1995), for the proposition that an attack on one portion of a property does not give rise to notice of an attack on a separate portion of the same property. Fadem concluded that the rule laid down in *Knapp v. United States,* 636 F.2d 279 (10th Cir. 1980) (determining that knowledge of the "contours" of the government's claim is sufficient to start the running of the statute of limitations), was inapplicable because "[t]here was no evidence such as the deed in *Knapp*, to give the Fadems notice the Government would assert a claim to the western section." *Fadam*, 52 F.3d at 207.

The present case is more in line with the reasoning in *Knapp* than *Fadem*. In this case the Treaty of Ruby Valley provided a clear declaration and acknowledgment that the Shoshone people claimed a large portion of land. When the 1951 litigation attacked the claim to nearly half of that land, the Shoshone were placed on notice that the United

States might have a claim against the remaining land described by the treaty. Thus, the Shoshone were apprised of the contours of the United State's claim in that they had a well defined tract of land to which the United States had laid claim to, without specifying boarders, an interest of nearly one half the land. This interest claimed by the United States was adverse to any claim of ownership by the Shoshone and effectively began the running of the statute of limitations. The subsequent *Dann* action only reinforced this conflict and leaves the court convinced that no reasonable landowner would not have known of the adverse claims of the United States.

As both of these actions occurred well outside of the twelve year statute of limitations contained in the QTA, the court concludes that the QTA bars the present lawsuit. As the statute of limitations in the QTA defines the court's jurisdiction based on the specific waiver of sovereign immunity, *see United States v. Sherwood.* 312 U.S. 584. 586 (1941), the court's conclusion that the statute of limitations bars the present action deprives the court of subject matter jurisdiction over the claims presented.

IT IS THEREFORE ORDERED that the United States' motion to dismiss (#52) the second amended complaints is GRANTED;

The motion for leave to file an amicus brief (#44) filed by the Indigenous Law Institute is GRANTED. The court has taken the brief into consideration.

The Clerk shall enter judgment accordingly.

DATED this 17th day of January, 2006.

/s/ Larry R. Hicks
LARRY R. HICKS
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed 06/07/2006]

03:04-CV-0702-LRH (VPC)

WESTERN SHOSHONE NATIONAL, *et al.*,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER

Presently before this court are two motions to reconsider (#63 & 64[1]). Plaintiffs Western Shoshone National Council, Raymond Yowell, Allen Moss, Joe Kennedy, John Wells, Carrie Dann, Johnny Bobb, Benny Riley and the Timibisha Shoshone Tribe (collectively "Western Shoshone National Council") and Plaintiffs South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain and Elko Band :collectively "South Fork Band") have objected to the court granting the United States previous motion to dismiss their claims (#61). The United States has filed an opposition to both motions Y66) to which only the Western Shoshone National Council has replied (#68).

Reconsideration of a district court's initial decision is inappropriate in the absence of (1) newly dis-

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[1] References to (#XX) refer to the court's docket.

covered evidence; (2) an intervening change in controlling law; or (3) clear error or manifest injustice. *See School Dist. No. 1J, Multnomah County, Or. v. AC and S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (citations omitted). A court does not abuse its discretion when it denies a motion to reconsider even though its underlying decision is merely erroneous; only "a failure to correct clear error constitutes abuse of discretion in this context." *McDowell v. Calderon,* 197 F.3d 1253, 1255 n.4 (9th Cir. 1999) (Emphasis in the original). Moreover, the motion must "set forth facts or law of a strongly convincing nature to induce the Court to reverse its prior decision." *Mutual Life Ins. Co. of New York v. Pointe Tapatio Resort Properties No. 1*, 206 F.R.D. 495, 497 (D. Ariz. 2002) (citations omitted).

Plaintiffs both request the court to reconsider its previous order based on clear error and manifest injustice. As discussed below, both requests will be denied as neither plaintiff has demonstrated proper grounds for relief.

1. Western Shoshone National Council Request

Western Shoshone National Council requests the court to reconsider its decision to strike their first three causes of action pursuant to Federal Rule of Civil Procedure 12(f). While the Western Shoshone National Council recognizes that its claims were an essential part of the South Fork Band's quiet title action, it is now claimed that those claims were stand alone issues that should not have been struck. Specifically, it is now claimed that these causes of action were in fact Rule 60(b) requests for relief from the original Ninth Circuit and Supreme Court opinions in *United States v. Dann*, 470 U.S. 39 (1985).

Even if the court were to accept that the Western Shoshone National Council was in fact attempting a Rule 60(b) request for relief from the prior *Dann* cases, reconsideration would not be appropriate. Acceptance of the Western Shoshone National Council's new independent claim theory would not create plain error as those claims were immaterial to the matter originally transferred to this court. Accordingly, the claims would have been struck under the same ground as the Western Shoshone National Council's fourth claim for relief. While there may be an appropriate way to bring these stricken claims seeking to reconsider decades old rulings before the court, attaching them to a transferred quiet title action is not that way.

2. South Fork Band Request

South Fork Band also fails to show clear error in the Court's initial decision. What South Fork Band does do is attempt to improperly relitigate the issues in this case. The Court is aware that motions brought pursuant to Fed. R. Civ. P. 59(e) 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *Haskell v. State Farm Mut. Auto. Ins. Co.*, 187 F. Supp. 2d 1241, 1244 (D. Haw. 2002) (quoting Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2810.1 (2d ed. 1995)). South Fork Band's arguments that a distinction exists between aboriginal title and treaty title that precludes any determination that constructive notice could be had in this case were raised in the original briefs. In ruling on the United States motion, the Court was fully aware of South Fork Band's arguments, considered them, and found them without merit. In addition, South

Fork Band's argument that application of the constructive notice doctrine of the Quiet Title Act is not appropriate when treaty rights are involved is more appropriately raised on appeal if one is taken. The court applied the law of the circuit to the facts of the case. The fact that South Fork Band does not think the law should apply does not demonstrate clear error.

It is therefore ORDERED that the Western Shoshone National Council Motion to Reconsider (#63) is DENIED;

It is further ORDERED that the South Fork Band Motion to Reconsider (#64) is DENIED.

DATED this 5th day of June, 2006.

/s/ Larry R. Hicks
LARRY R. HICKS
United States District Judge

APPENDIX D

UNITED STATES CODE ANNOTATED

Title 28. Judiciary and Judicial Procedure
Part VI. Particular Proceedings
Chapter 161. United States as Party Generally

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this sec-

tion. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

CREDIT(S)

(Added Pub.L. 92-562, § 3(a), Oct. 25, 1972, 86 Stat. 1176, and amended Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 99-598, Nov. 4, 1986, 100 Stat. 3351.)

Current through P.L. 110-260 (excluding P.L. 110-234, 110-246) approved 7-1-08

APPENDIX E

TREATY WITH THE WESTERN SHOSHONI, 1863.

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this first day of October, A. D. one thousand eight hundred and sixty-three, between the United States of America, represented by the undersigned commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, as follows:

ARTICLE 1.

Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shoshonee nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

ARTICLE 2.

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over either of said routes is hereby guarantied by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for mail or telegraph companies.

ARTICLE 3.

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property and the lives and property of passengers in the stages and of the employees of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by the said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of country claimed or occupied by them.

ARTICLE 4.

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be erected and timber taken for their use, as also for building and other purposes in any part of the country claimed by said bands.

ARTICLE 5.

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

> On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-non-to-yah Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

ARTICLE 6.

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

ARTICLE 7.

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for

herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

ARTICLE 8.

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to five thousand dollars as presents at the conclusion of this treaty.

Done at Ruby Valley the day and year above written.

James W. Nye.
James Duane Doty.

Te-moak, his x mark.	Po-on-go-sah, his x mark.
Mo-ho-a.	Par-a-woat-ze, his x mark.
Kirk-weedgwa, his x mark.	Ga-ha-dier, his x mark.
To-nag, his x mark.	Ko-ro-kout-ze, his x mark.
To-so-wee-so-op, his x mark.	Pon-ge-mah, his x mark.
Sow-er-e-gah, his x mark.	Buck, his x mark.

Witnesses:

J.B.Moore, lieutenant-colonel Third Infantry California Volunteers.

Jacob T.Lockhart, Indian agent Nevada Territory.

Henry Butterfield, interpreter.

Oct. 1, 1863. 1 18 Stats., 689. 1 Ratified June 26, 1866. 1 Proclaimed Oct. 21, 1869.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA RENO, NEVADA

Case No. CV-04-0702-LRH-VPC

WESTERN SHOSHONE, etc., *et al.*,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

SECOND AMENDED COMPLAINT

Plaintiffs, South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain Band and Elko Band, by and through undersigned counsel, bring this Third Amended Complaint against the United States, and state as follows:

PARTIES AND JURISDICTION

1. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1362, 2201 and 2409a. This is a civil action brought by Indian Tribes or bands and arises under the Constitution, treaties and agreements between the United States and the Tribe, federal common law and the federal statutes.

2. Plaintiff Te-Moak Tribe of Western Shoshone Indians ("Te-Moak Tribe") is a federally recognized tribe which acts as representative body of Battle Mountain Band, Elko Band South Fork Band and Wells Band.

3. Plaintiff South Fork Band is a federally recognized band of the Te-Moak Tribe.

4. Plaintiff Battle Mountain Band is a federally recognized band of the Te-Moak Tribe.

5. Plaintiff Elko Band is a federally recognized band of the Te-Moak Tribe.

6. Plaintiff Winnemucca Indian Colony is a band of Western Shoshone Indians.

7. Plaintiff Dann Band is a traditional Western Shoshone family and this action is brought through its representatives Mary Dann and Carrie Dann.

GENERAL ALLEGATIONS

The Western Shoshone Nation

8. The Western Shoshone people identify themselves as *Newe*, a word that means "the people." Their homelands stretch in the north from the Snake River Valley in Idaho, in the east from Salt Lake Valley in Utah, in the west across most of eastern and central Nevada, and southward into Death Valley and the Mojave Desert of California. Most of these lands are within what is known as the Great Basin, a high altitude desert with no external drainage to the ocean. (The Western Shoshone homelands shall be referred to as the "Western Shoshone Land Base".)

9. Prior to the appearance of white people, the Western Shoshone lived in extended family groups, congregating together in times of ceremony or collective food gathering activities, such as antelope drives and pinenut picking.

10. The Western Shoshone people have continuously owned and occupied the Western Shoshone Land Base since time immemorial.

11. Today the Western Shoshone people generally live in various communities, some of which include: Battle Mountain Indian Colony, Elko Indian Colony, Wells Indian Colony, South Fork Reservation, Ruby Valley Allotments, Odgers Ranch, Dann Ranch, Yomba Reservation, Duckwater Reservation, Ely Indian Colony, Winnemucca Indian Colony and the Timbisha Community.

12. The Western Shoshone Nation is comprised of bands or tribes of Native American Indians. Some of the Bands are formally recognized by the Congress of the United States under the Indian Reorganization Act.

13. The people of the Western Shoshone, and their bands, tribes and communities shall be collectively referred to as the "Western Shoshone Nation". Plaintiffs bring this action on behalf of themselves and the Western Shoshone Nation.

14. The Western Shoshone Nation own and occupies a large tract of land in Nevada, California, Idaho and Utah which exceeds over 60 million acres.

The Treaty of Ruby Valley

15. On October 1, 1863 the United States government and the Western Shoshone Nation entered into a treaty known as the Treaty With The Western Shoshone, 1863. 18 Stat. 689, Ratified June 26, 1866, Proclaimed October 21, 1869. (The "Treaty of Ruby Valley") A copy of the Treaty of Ruby Valley is attached hereto as Exhibit A.

16. The Treaty of Ruby Valley is a valid and binding contract between the United States and the Western Shoshone Nation. The Treaty of Ruby Valley is enforceable by law.

17. Article 5 of the Treaty of Ruby Valley states as follows:

> It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:
>
> > On the north by Wong-goga-da Mountains and Shoshone River Valley; on the west by Su-non-to-yah Mountains or Smith creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

The boundaries described in Article 5 are generally shown in the map attached hereto as Exhibit B. (The land described in Article 5 of the Treaty of Ruby Valley shall be referred to as the "Western Shoshone Fee Title Land".)

18. The Congress of the United States expressly recognized permanent ownership of Western Shoshone Fee Title Land in the Western Shoshone Nation when it ratified the Treaty of Ruby Valley on June 26, 1866.

19. The Western Shoshone Nation continues to own the Western Shoshone Fee Title Land. The Western Shoshone ownership includes all rights typically associated with such title, including without limitation, the right to hunt and fish, and to live and work the land (for example, all rights to farming, ranching and grazing). Also encompassed within this title are all mineral rights from the land including gold, silver, copper, timber and water.

20. The Western Shoshone Nation continues to occupy and use a substantial portion of the Western Shoshone Land Base.

21. Under the Treaty of Ruby Valley, the Western Shoshone Nation granted the United States certain privileges for use of and access to the land described in the Treaty and, in exchange, the United States recognized Western Shoshone ownership of the land which under U.S. law equates to statutory or fee title.

22. Article 2 of the Treaty of Ruby Valley provides that "[t]he several routes of travel through the Shoshone country, nor or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all the emigrants and travellers under its authority and protection. . ." Article 2 further authorizes the Government to establish military posts and station houses in the Shoshone country.

23. Article 3 of the Treaty allows the continuation of "telegraph and overland stage lines", and also allows for the construction of a railway and its branches through Shoshone country. Article 4 of the Treaty provides that the Western Shoshone Fee Title Land may be "prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required."

24. The Treaty of Ruby Valley thus provides the U.S. Government and private citizens acting under the authority of the U.S. Government with certain rights and privileges to use and occupy the Western Shoshone Fee Title Land, which are not inconsistent with the Western Shoshone Nation's Fee Title and concomitant rights in the Western Shoshone Fee Title Land.

25. In the late 19th century and throughout the 20th century, mining and agricultural settlements were formed and ranches were established on the Western Shoshone Fee Title Land.

The Indian Claims Commission

26. In 1951, a Petition was filed against the United States of America by the Te-Moak Bands of Western Shoshone Indians before the Indian Claims Commission (the "ICC"). The Te-Moak Bands alleged in the Petition that they represented the Western Bands of the Shoshone Nation. The ICC petition was assigned docket No. 326 (hereinafter the "ICC Claim").

27. The ICC Claim was filed by the law firm of Wilkinson, Cragun & Barker (the "Barker Law Firm").

28. Count 1 of the ICC Claim plead a "Taking of Lands" and alleged that (a) the Western Shoshone Nation owned and occupied certain land since time immemorial ("Aboriginal Title"), and (b) the Western Shoshone Nation held recognized title and ownership to land under the Treaty of Ruby Valley (Western Shoshone Fee Title Land).

29. During the course of the litigation before the ICC, the Te-Moak Bands (the original plaintiff) realized that the Barker Law Firm was not acting pursuant to their instructions. Specifically, counsel refused to assert the position that the Western Shoshone Land Base was not taken by the government. Ultimately, the Te-Moak Bands fired the Barker Law Firm. The BIA refused to accept this discharge of counsel and renewed the legal contract of the Barker Law Firm on behalf of the Te-Moak Bands. The Te-Moak Bands filed a notice of discharge of counsel with the ICC. Despite the discharge of counsel the ICC, the Barker Law Firm and the

United States moved forward with the Barker Law Firm purportedly representing the interests of the petitioners.

30. The ICC, the Barker Law Firm and the United States created a fiction known as the Western Shoshone identifiable group during the early stages of the litigation. This fictional entity became the de facto plaintiff after the Te-Moak Bands terminated their counsel. The Western Shoshone identifiable group is not a recognized legal entity by the Western Shoshone people and had no authority to represent the interests of the Western Shoshone Nation. Upon information and belief, after the Te-Moak Bands terminated the Barker Law Firm, the Barker Law Firm had no representative, decision-making client other than the BIA.

31. On October 16, 1962 the ICC issued Findings of Fact, determining that the Western Shoshone identifiable group held certain land under Aboriginal Title and that the United States had extinguished the Western Shoshone's Aboriginal Title without compensation as follows:

> The Commission further finds. . . the Western Shoshone identifiable group exclusively used and occupied their respective territories as described in Finding . . . 23 (except the Western Shoshone lands in the present State of California) until by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands.

11 Ind.Cl.Comm. 387, 416.

32. Paragraph 23 of the ICC's Findings of Fact contained a description of territory which encompassed approximately 24 million acres of land.

33. The Commission did not make any finding relating to the Western Shoshone Fee Title Land in its Findings of Fact. Nor did it make any findings regarding the land not described and encompassed within the approximate 24 million acres set forth in Paragraph 23 of its Findings of Fact.

34. On October 16, 1962, the ICC issued an Opinion of the Commission (the"1962 Opinion") and held:

> "The Commission also concludes that the. . . Western Shoshone identifiable group w[as] [a] land-using entit[y] which respectively held Indian title to the lands described in Findings of Fact Nos. 21, 22 and 23, and that said Indian title was acquired by the United States from th[is]. . . aforementioned land-using entit[y] without the payment of compensation therefor and said land-using entit[y is] entitled to recovery under Section 2, Clause (4) of the Indian Claims Commission Act . . . The Indian title of the Western Shoshone group in their lands located in California was extinguished by the United States on March 3, 1853, *Mohave Tribe v. United States*, 7 Ind. Cl. Comm. 219. The case will now proceed to a determination of the dates of . . . extinguishment of the Indian title of the lands of the Western Shoshone group which were not within the boundaries of the present State of California; 11 Ind.Cl.Comm. 387, 445."

35. The Commission did not make any ruling relating to the Western Shoshone Fee Title Land in the 1962 Opinion.

36. On February 11, 1966, the ICC approved a joint stipulation setting the date for valuation of the land described in its 1962 opinion as of July 1, 1872.

37. On October 11, 1972, the ICC issued an Opinion of the Commission (the"1972 Opinion") and held that the fair market value of the land held by Aboriginal Title (described in paragraph 23 of the Findings of Fact) on the date of taking was $21,550,000 and the value of minerals removed from the land prior to the taking was $4,604,600 for a total of $26,154,600 (the "ICC Judgment").

38. The Commission did not make any ruling relating to the Western Shoshone Fee Title Land in the 1972 Opinion.

The Relationship Between the Western Shoshone Nation and the United States

39. On December 9, 1991, the Ninth Circuit decided *Western Shoshone National Council et al. v. Molini,* 951 F.2d 200 (9th Cir. 1991). In *Molini*, members of the Western Shoshone Nation brought an action against the Nevada Department of Wildlife alleging that regulations adopted by the State of Nevada interfered with the Plaintiffs' right to hunt and fish on their land. The Ninth Circuit in *Molini* held that the plaintiffs there could not enforce hunting and fishing rights against the State of Nevada, stating erroneously that the ICC Judgment had extinguished the plaintiffs right to fee title under the Treaty of Ruby Valley.

40. Prior to the *Molini* decision, and for a period of years thereafter, the U.S. Government gave no indication to Plaintiffs here of its position that the ICC Judgment extinguished Plaintiffs' rights and

interests in the Western Shoshone Fee Title Land under the Treaty of Ruby Valley.

41. The Western Shoshone Nation continue to occupy and use their land. Approximately eighteen months prior to the filing of this action, the U.S. first commenced action to deprive the Western Shoshone Nation of their use and occupancy in the Western Shoshone Fee Title Land by, among other things, forcibly removing livestock from the land. Plaintiffs did not become reasonably aware of the U.S. Government's claims inconsistent with Plaintiffs' Treaty rights in the Western Shoshone Fee Title Land until such recent actions by the U.S. Government.

42. There is a general trust relationship between the Indian peoples and the United States Government. Principles of trust and fair dealing have controlled the government's dealing with Indian nations. The U.S. Government has acted as guardian of the Indian people in numerous respects, particularly with regard to land and the use of land consistent with this relationship. Treaties between Indian Tribes and the United States are to be interpreted as the Indians understood them, with any ambiguities construed liberally in favor of the Tribes.

43. Representations and assertions made to Indian peoples by representatives of the United States government, particularly officials from the Department of the Interior and the Bureau of Indian Affairs, carry great weight and the authority of a fiduciary advising its ward.

44. The BIA, through its agents, made material misrepresentations to prevent Plaintiffs from filing this action earlier.

45. The representations made by BIA or its agents were false and were made with the intent to induce Plaintiffs not to pursue their rights under the Treaty of Ruby Valley and to prevail on them from seeking to quiet title to their lands.

46. Specifically, on or about August 1973, Steve Feraca on behalf of the BIA, and in the Government's fiduciary capacity for the Western Shoshone Nation, advised the Western Shoshone Nation that it held no rights or claims to land under the Treaty of Ruby Valley. Specifically, Steve Feraca stated:

> "The Western Shoshone Treaty of 1863 does not give the Shoshones any land, it takes away land . . . according to the treaty you lost everything."

These statements were false and Steve Feraca knew they were false when made. Steve Feraca made these misrepresentations in order to induce the Western Shoshone Nation not to file this claim and seek to quiet title to their lands.

47. These misrepresentations and assertions were made with the purpose and intent of inducing the Western Shoshone Nation to accept the approximate $26.1 million award of the ICC and pursue no further land rights against the U.S. Government. The Western Shoshone Nation relied upon the misrepresentations made by the BIA, through its agents including Steve Feraca, and did not assert its fee title rights under the Treaty of Ruby Valley until the filing of this action.

COUNT I

(Action to Quiet Title – Western Shoshone Fee Title Land)

48. Plaintiffs repeat and reallege paragraphs 1 through 47 above.

49. The Treaty of Ruby Valley establishes fee title to the Western Shoshone Fee Title Land for the Western Shoshone Nation.

50. The fee title of the Western Shoshone Nation to the Western Shoshone Fee Title Land has never been actually litigated, nor has any judicial decision or decree impaired this title. Even if there were determined to be a judicial decision or decision impairing this title, it is not binding upon Plaintiffs for the reasons set forth in this Complaint.

51. In 1946, Congress enacted the Indian Claims Commission Act, 60 Stat.1049, 25 U.S.C. §70 *et. seq.* (1976 ed). ("ICCA"). The ICCA was substantially repealed as of September 30, 1978, including 25 U.S.C. §70u, Act Aug. 13, 1946, c. 959, §22, 60 Stat. 1055. (*See* PL 94-465, Oct. 8, 1976, 90 Stat. 1990). This repealed provision stated that "the payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands, touching on any of the matters involved in the controversy." *Id.*, §22(a). The ICC Judgment was certified by the U.S. Court of Claims for payment on December 6, 1979. Pursuant to this certification, the Government was required to place the $26.1 million award of the ICC Judgment in trust. In *United States v. Dann*, 470 U.S. 39, 105 S.Ct. 1058 (1985), the Supreme Court held that "payment" of the award of the ICC Judgment had been effected upon the deposit of these funds into a trust account. Nonetheless, on December 6, 1979 when the award of the ICC Judgment was certified, and thereafter when "payment" was made in accordance with the Supreme Court's determination, Section 22(a) of the ICCA had been terminated and omitted from the U.S. Code and was inapplicable.

52. Upon information and belief, the United States has taken the position that the Treaty of Ruby Valley confers no fee title rights in the Western Shoshone Fee Title Land to the Western Shoshone Nation, but that this land was and is the real property of the United States.

53. Plaintiffs and the Western Shoshone Nation had no reason to know of the Government's position regarding fee title rights in the Western Shoshone Fee Title Land until, at the earliest, within 12 years of the original filing of this action.

54. In addition, the Western Shoshone Nation asserted treaty title rights under the Treaty of Ruby Valley in its Petition filed with the ICC. The treaty rights asserted in the ICC proceeding were never litigated or adjudicated; nonetheless, the filing of the ICC claim tolled any statute of limitations applicable to the Western Shoshone Nation's treaty title rights until the filing of this action, or until such time after the termination of the ICC proceedings that the U.S. government disputed Western Shoshone fee title.

55. There is a disputed title to the Western Shoshone Fee Title Land.

56. Plaintiffs seek, pursuant to 28 U.S.C. §2409a, a determination of their fee title rights in the Western Shoshone Fee Title Land under the Treaty of Ruby Valley.

WHEREFORE, Plaintiffs demand judgment establishing fee title in their favor to the Western Shoshone Fee Title Land, and such other and further relief as this Court deems just and proper.

COUNT II

(Action to Quiet Title - Aboriginal Title to Lands Not at Issue Before the ICC)

57. Plaintiffs repeat and reallege paragraphs 1 through 47 above.

58. The ICC Judgment purports to extinguish the Western Shoshone Nation's aboriginal title to approximately 24 million acres of land.

59. In the event it is determined that Plaintiffs are bound by the ICC Judgment, Plaintiffs seek a determination of the Western Shoshone Nation's aboriginal title within the Western Shoshone Land Base not at issue before the ICC. In this regard, the Treaty of Ruby Valley acknowledges, admits and recognizes that the Western Shoshone Nation's aboriginal title extends to approximately 60 million acres described therein by reference to specific boundaries.

60. The other 36 million acres of recognized Western Shoshone land was never litigated and not at issue in the ICC proceeding. The ICC Judgment does not adjudicate or otherwise mention these 36 million acres. No judicial decision or decree has otherwise impaired aboriginal title to this land.

61. The Western Shoshone Nation has had actual and continuous possession of the Western Shoshone Land Base until the present.

62. Upon information and belief, the United States has taken the position that the Western Shoshone have no rights whatsoever in the Western Shoshone Land Base.

63. None of the Plaintiffs knew, nor should they have known, of the Government's claims inconsistent

with their aboriginal title to the 36 million acres until within 12 years of the original filing of this action.

64. Plaintiffs seek, pursuant to 28 U.S.C. 2409a, a determination of their aboriginal rights to the 36 million acres of land identified in the Treaty of Ruby Valley but not included in the ICC Judgment.

WHEREFORE, Plaintiffs demand judgment establishing aboriginal title in their favor to the approximate 36 million acres of land not included in the ICC Judgment, and such other and further relief as this Court deems just and proper.

HAGER & HEARNE, P.A.
Local Counsel for South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain Band and Elko Band
910 East Paxx Boulevard, Ste. 8
Reno, Nevada
Telephone: (775)329-5800
Facsimile: (775)329-5819
By: ____/s/_____
Robert R. Hager

-and-

HERMAN & MERMELSTEIN, P.A.
Jeffrey M. Herman, Esquire
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18205 Biscayne Blvd., Suite 2218
Miami, Florida 33160
Telephone: (305) 931-2200
Facsimile : (305) 931-0877

EXHIBIT A

TREATY WITH THE WESTERN SHOSHONI, 1863.

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this first day of October, A. D. one thousand eight hundred and sixty-three, between the United States of America, represented by the undersigned commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, as follows:

ARTICLE 1.

Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shoshonee nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

ARTICLE 2.

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over either of said routes is hereby guarantied by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for mail or telegraph companies.

ARTICLE 3.

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property and the lives and property of passengers in the stages and of the employees of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by the said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of country claimed or occupied by them.

ARTICLE 4.

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be erected and timber taken for their use, as also for building and other purposes in any part of the country claimed by said bands.

ARTICLE 5.

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

> On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-non-to-yah Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

ARTICLE 6.

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

ARTICLE 7.

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for

herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

ARTICLE 8.

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to five thousand dollars as presents at the conclusion of this treaty.

Done at Ruby Valley the day and year above written.

James W. Nye.
James Duane Doty.

Te-moak, his x mark.	Po-on-go-sah, his x mark.
Mo-ho-a.	Par-a-woat-ze, his x mark.
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To-so-wee-so-op, his x mark.	Pon-ge-mah, his x mark.
Sow-er-e-gah, his x mark.	Buck, his x mark.

Witnesses:

J.B.Moore, lieutenant-colonel Third Infantry California Volunteers.

Jacob T.Lockhart, Indian agent Nevada Territory.

Henry Butterfield, interpreter.

Oct. 1, 1863. 1 18 Stats., 689. 1 Ratified June 26, 1866. 1 Proclaimed Oct. 21, 1869.

BEST AVAILABLE COPY

EXHIBIT B